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IN THE

Supreme Court of the United States

October Term, 1966

Number 670

JOHN LESTER ELLENBURG AND
BEN EDELSTEIN,

Petitioners

vs.

THE STATE OF GEORGIA,

Respondent

PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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Now comes JOHN LESTER ELLENBURG and BEN EDELSTEIN, Petitioners in Certiorari, and petitions this Honorable Court for the writ of certiorari to the Court of Appeals of the State of Georgia.

OPINION BELOW

The opinion of the Court of Appeals of Georgia is reported unofficially in 148 S.E. Reporter, 2nd, p. ____. The opinion of the Court of Appeals is appended hereto.

JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on April 18, 1966, and a timely motion for rehearing filed April 25, 1966 was denied May 4, 1966. A petition for certiorari was filed in the Supreme Court of Georgia on May 31, 1966 and denied by that Court without opinion on July 11, 1966, and a motion for reconsideration was denied by the Georgia Supreme Court on July 21, 1966.

Jurisdiction of this Court is invoked under Title 28, U.S.C. 1257 (3), giving this Court jurisdiction to grant certiorari to the final judgments of the highest court of a State in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Does the admission into evidence of an affidavit for search warrant and search warrant issued by a state court judge without statutory authority, in a criminal case and over objection of defendant, violate the 4th and 14th Amendments to the United States Constitution?

2. Where a search warrant authorizes a search for "records, money, and other bookmaking paraphernalia" described in an attached affidavit, and the referred to affidavit merely describes them as "records of bets, names or symbols of bettors, amounts bet, amounts of money 'laid off' with other professional bookmakers, financial records showing the status of said bookmaking business and showing the amount of money owed to winning bettors and the amount of money to be collected from losing bettors, large quantities of 'flash paper' being inflam-

mable paper which can be instantly ignited so as to destroy any records of the commission of said offense, and large sums of money representing wagers collected from bettors on said professional and college football games," does the warrant sufficiently comply with the 4th Amendment to the United States Constitution forbidding any warrant to issue that does not "particularly describe" the article or things to be seized, and thus offend the "due process" clause of the 14th Amendment when used as the basis for the admissibility of evidence seized from a defendant in a State criminal case?

3. When a State judge issues a search warrant, and finds "sufficient cause" in the warrant, but makes no determination or finding of "probable cause" as required by the Fourth Amendment, is the warrant sufficient to authorize a search under the Fourth and Fourteenth Amendments to the United States Constitution?

4. Is a record identified as a line sheet and found in the physical possession of a defendant at the time of the execution of a search, admissible in evidence over objection that the search warrant does not particularly describe such document or authorize its seizure, and does its admission into evidence offend the Fourth and Fourteenth Amendments to the United States Constitution?

5. Where the only facts tending to establish the grounds for the issuance of a search warrant consist of (1) information of an undisclosed informer, (2) reputation of the alleged occupants, (3) reports of investigators that the premises sought to be searched appear to be deserted, and (4) that telephone calls to the premises reveal a reply from an occupant, are such facts sufficient to constitute probable cause for the issuance of a warrant to search the premises under the standards required

by the Fourth and Fourteenth Amendments to the United States Constitution?

6. Is the search warrant in this case, authorizing a search for "records, money and other bookmaking paraphernalia" so general in its descriptive terms as to offend the Fourth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT FOUR to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT FOURTEEN to the Constitution of the United States:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioners were jointly indicted in the Superior Court of Fulton County, in the State of Georgia, for the offenses of operating a gaming house and betting on sporting events (R. 17), and the indictment was transferred to

the Criminal Court of Fulton County for trial (R. 16). After a trial before the Court without a jury, they were found guilty (R. 19) and each sentenced to serve sentences within the terms provided by State law (R. 12). A petition for certiorari was applied for in the Superior Court of Fulton County (R. 5), (this being the only method of review from this Court by Georgia law) and the writ was sanctioned (R. 10). After the trial judge answered the writ and admitted all issues and statements of fact (R. 247) the case came on for a hearing in the Superior Court of Fulton County, at which time it was overruled and denied without opinion (R. 250). An appeal was filed to the Georgia Court of Appeals (R. 1), and the judgment of the Superior Court was affirmed. (R. 260). Motion for rehearing was filed by petitioners (R. 261) and was denied by the Court of Appeals (R. 272). Application for certiorari was then made to the Supreme Court of Georgia (R. 274). This was denied (R. 275). A motion for reconsideration was then made to the Supreme Court of Georgia, and this motion for reconsideration was denied on July 21st, 1966. (See Supplemental Record.)

At the time of the trial of the case counsel for petitioners, hereinafter called defendants, objected to the introduction in evidence of an affidavit and search warrant (R. 26), insisting that the facts stated in the affidavit were insufficient on their face to constitute probable cause (R. 6), that the warrant was general in not particularly describing the articles to be seized as required by the Fourth Amendment and Fourteenth Amendment, that the warrant was void because it issued for articles not provided for by statute, that there was no finding of probable cause in the warrant, and that

there is no authority under Georgia statutes to authorize a search for records, money and other bookmaking paraphernalia described in the affidavit (R. 7). Counsel for defendants also objected to the introduction in evidence of the records seized by authority of the warrant on similar grounds (R. 7). The objections were overruled by the trial judge (R. 55), and the affidavit and warrant were admitted in evidence (R. 234-237).

During the trial of the case, and while the argument to the objection was being made by counsel for defendants, the case of Stanford versus State of Texas, decided by the Supreme Court of the United States on January 18, 1965 (379 U. S. 476), being a full bench decision written by Mr. Justice Stewart, was cited by counsel for defendants. After considerable colloquy between court and counsel, the trial judge reasoned thus: "There're some of these cases that would indicate that even though I differ with you that they ever intended to indicate, I attribute it to the loose language of uninformed men who live in an air castle, who are more bent on pursuing political ideas than they are giving objective reasoning to common, ordinary, horse-sense ruling. That's what I attribute it to. That they never meant to do that, and that when we read that language into it its more a reflection of the ignorance and the total separation of some of these judges of the higher levels from the reality of life in America, than it is their struggle to maintain liberty. It's a reflection of their ignorance, and I'm overruling this point of it" (R. 40). The entire colloquy between court and counsel appears from pages 27 through 55 of the record, dealing with the specific objections.

REASONS RELIED UPON FOR GRANTING WRIT OF CERTIORARI

1. The Georgia Court of Appeals, in relying upon the case of Gouled versus United States, 255 U.S. 298, misconstrued and misinterpreted the questions therein decided, and has thus permitted search warrants to issue for the seizure of articles not provided by law, but authorized at common law, even though the common-law did not in fact authorize their seizure.

2. The Georgia Court of Appeals has permitted a general search warrant to issue for the seizure of books and records not particularly described in the warrant, thus leaving to the discretion of the officer executing the warrant what articles or things should be seized.

3. The questions involved are of the utmost importance in the administration of justice by the States, and should be decided by the Supreme Court of the United States.

4. The trial judge and consequently the Georgia Court of Appeals has refused to recognize or apply the case of Stanford v. Texas, 379 U.S. 476, as applicable to a search warrant for the books and records in a gambling case.

ARGUMENT AMPLIFYING REASONS RELIED UPON

The Georgia Court of Appeals relied upon the case of Gouled v. United States, 255 U.S. 298, as authority for their holding that a Georgia judge, even though without statutory authority to issue a search warrant, is authorized by the common-law to issue it. Gouled makes no such ruling. In an obiter dicta statement the Supreme Court merely pointed out that there were instances where the judges of the early common law issued search warrants, just as they issued *general* search warrants and *writs of assistance*. However, such general search warrants and writs of assistance were the very reasons and foundations for the passage of the Fourth Amendment; to make sure that they would not be issued any more.

The trial judge absolutely refused to apply the provisions of Stanford, steadfastly holding to the view that the ruling was *wrong* and at no rate should it be applied in a gambling case. On the other hand, the petitioners in certiorari maintain that the Stanford case shuts the door to the issuance of search warrants which authorize the executing officer to use his judgment and discretion as to what articles or things he is to seize. This is a matter to be left to the magistrate issuing the warrant. His determination should not be substituted by the officer engaged in executing the warrant.

Certiorari should be granted in this case, and the Court should give full opportunity to go into these questions in order that the law may be fully settled.

Furthermore, the underlying facts of the affidavit are insufficient on their face to constitute probable cause for the issuance of the warrant, and, as a further fact, the

judge issuing the warrant did not find probable cause to have existed. The warrant merely states "sufficient cause" for the issuance of the warrant, and such finding does not comport with the plain language of the Fourth Amendment requiring "probable cause."

"Sufficient cause" as used by the judge in issuing the warrant may or may not have been probable cause, and, since the facts upon which the warrant was predicated do not import probable cause on their face, the warrant should be declared void.

APPENDIX

(a) Attached hereto is a copy of the judgment and opinion of the Court of Appeals in its entirety.

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At the time the Constitution was adopted, stolen or forfeited property, or property liable to duties, and concealed to avoid payment of them, excisable articles, and books required by law to be kept with respect to them, counterfeit coin, burglar's tools and weapons, implements of gambling, and many other things of like character might be searched for in home or office, and, if found, might be seized under search warrants lawfully applied for, issued and executed.

Ellenburg and others were indicted for gambling by soliciting bets and wagers on the results of football games. On the trial of the case evidence was offered as to the seizure of "flash paper" with which papers on a desk were ignited by the defendants, together with sheets of paper showing odds on football games and lists of wagers accepted, cash, a pill, utility bills, 2 portable radios, a lighter, and federal wagering tax forms. Following conviction, the defendants certioraried the case to the Superior Court of Fulton County, contending that the search warrant, by means of which peace officers entered the premises, was void because executed for an unauthorized purpose. The warrant directed the peace officers to search the premises for "records, money, and other bookmaking paraphernalia described in the affidavit" in support of the criminal charge. The affidavit, signed by an assistant to the Solicitor General, recited the method of soliciting bets on athletic contests, that defendants were operating a bookmaking establishment on the premises and had concealed therein certain paraphernalia including records and bets, names of bettors and amounts and financial records showing the status of the bookmaking business, together with flash paper to be used in destroy-

ing records and large sums of money representing wagers. The denial of the petition for certiorari is the basis of this appeal.

HALL, Judge. "A search warrant may be issued only for the making of a search authorized at common law or by statute." Johnson v. State, 111 Ga. App. 298, 302 (SE2d). Prior to the Search and Seizure Act of 1966, Ga. L. 1966, p. 567, there was no statute expressly authorizing the issuance of a search warrant for the implements of gambling. The common-law of Georgia is "the Common Law of England, and such of the Statute Laws as were usually in force before the Revolution, with the following limitations" — the prohibitions of the Constitution of the United States, the Georgia Constitution and the statutes of this state. Flint River Steamboat Co. v. Foster, 5 Ga. 194 (5) (SE).

The defendants contend that at the time of the Revolution the law did not authorize the issuance of a search warrant for gambling implements. We disagree. A unanimous opinion of the Supreme Court of the United States provides: ". . . at the time the Constitution was adopted, stolen or forfeited property, or property liable to duties, and concealed to avoid payment of them, excisable articles, and books required by law to be kept with respect to them, counterfeit coin, burglar's tools and weapons, implements of gambling, and many other things of like character might be searched for in home or office, and, if found, might be seized under search warrants lawfully applied for, issued and executed." Gouled v. United States, 255 U. S. 298, 308; 79 C. J. S. 827, §64, n. 89. The basic reason the law allowed the issuance of these warrants was that ". . . the citizen was for some reason not entitled to possess the property." Kaplan, Search and Seizure: A No-Man's Land in the

Criminal Law, 49 Calif. L. Rev. 474, 475. See also 2 Hale, Pleas of the Crown, 149 (Stokes and Ingersoll ed. 1847). Accord Kneeland v. Connally, 70 Ga. 424 (SE); Smoot v. State, 160 Ga. 744 (SE); Heath Sales Co., Inc. v. Bloodworth, 221 Ga. 567 (SE). The Supreme Court of New Jersey has held that the authority to issue this type of warrant ". . . is implicit in the judicial power." Eleuteri v. Richman, 26 N.J. 508 (141 A. 2d 46); State v. Macri, 39 N. J. 250 (188 A. 2d 389). This power has been exercised by our Georgia Courts for almost two hundred years.

The decision in Mapp v. Ohio, 367 U. S. 643, imposes no constitutional problem. In a later case, Ker v. California, 374 U. S. 23, the Supreme Court was more explicit as to the Mapp doctrine and federal-state relations. That Court stated that there was to be no assumption by it of "supervisory authority over state courts," nor did Mapp imply "total obliteration of state laws relating to arrests and seizures in favor of federal law." Both federal and state systems can take their own approach so long as each respects the same "fundamental criteria." From the above, it would seem that the Supreme Court is not concerned with whether a search warrant is issued pursuant to statute or the common law authority of the state judiciary. The phrase "fundamental criteria" is concerned with whether the warrant was issued "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized" (Constitution of the United States, Amendment IV), and whether it was executed in a reasonable manner.

Judgment affirmed.

Nichols, P. J., and Deen, J., concur.

COURT OF APPEALS OF THE STATE OF GEORGIA

Atlanta, April 18, 1966.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

J. L. Ellenburg et al v. The State

This case came before this court upon an appeal from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Nichols, P. J., Hall and Deen, JJ., concur.

Bill of cost, $30.00.

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BEN EDELSTEIN,

Petitioners

vs.

THE STATE OF GEORGIA,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE STATE OF GEORGIA,

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent prays that the petition for writ of certiorari be denied, giving reasons herein for this position.

OPINION BELOW

The published Opinion of the Court of Appeals of Georgia is found in 113 Ga. App. 585. However, the published opinion is not the entire Opinion in the following respect: The published opinion is that which was announced by the Court of Appeals of Georgia on April 18, 1966, in announcing its affirmance of the case. Thereafter a motion for rehearing was filed by Appel-

lant, and this motion was denied on May 4, 1966, with an additional nine-line statement or opinion by the Court of Appeals. This additional Opinion was marked by the Court "Not to be Published," under authority of an Act of the Legislature of Georgia (Ga. Laws 1966, page 500) amending Ga. Code section §6-1606, which law allows the Georgia appellate courts to reduce to some extent the vast quantity of printed matter adding to the book shelf requirements of law libraries from year to year. A certified copy of the said additional Opinion on Motion for Rehearing is being filed with the United States Supreme Court, at the time of filing this brief, under authority of Rule 21 (6), Supreme Court Rules. The additional opinion is as follows:

ADDITIONAL OPINION

"41701 ELLENBURG v. THE STATE

ON MOTION FOR REHEARING

(Not to be published)

"On motion for rehearing, the appellants now seek to raise questions in addition to that which they argued on the appeal and which the Court answered in the opinion.

"On page 4 of appellants' original brief, they state: 'The appellants in this case are content to base their case in this Court on the one main proposition contended all throughout the trial of the case in the Criminal Court and in the Superior Court on certiorari, to-wit: THAT IT WAS ISSUED FOR ARTICLES NOT PROVIDED FOR BY STATE STATUTE.'"

JURISDICTION

Jurisdiction has been invoked by the petitioner under the provisions of 28 U.S.C.A. sec. 1257 (3). Jurisdiction is doubted by respondent on the ground that there is no substantial Federal question presented for review, in fact no Federal question at all seems to be presented for review, in view of the limitation of the issue and decision in the Georgia appellate courts, as pointed out by the above additional Opinion. Cf. Rule 19 (1) (a), United States Supreme Court.

QUESTION PRESENTED

In a criminal conviction for operating a gaming house and soliciting bets on football games, in which the prosecution introduced documentary evidence seized under a search warrant which was objected to on the ground that the search warrant was void, and when the defendant appealed to the state appellate court and based his appeal upon the sole ground that the search warrant "issued for articles not provided for by state statute," and the state appellate court ruled upon that one question alone, can a petitioner for certiorari in the United States Supreme Court raise additional questions of Federal constitutional law which were not decided by the state appellate courts?

ARGUMENT

1. The Writ of Certiorari Should Not Be Granted, As the Only Question Decided by the Georgia Appellate Courts Was Whether or Not the Search Warrant Issued for Articles Not Provided for by Georgia Law.

The appeal was limited to that question because the Appellant based his appeal upon that sole ground, as stated in Appellant's brief and argument quoted in the additional opinion of the Court of Appeals of Georgia on the motion for rehearing.

In his petition for certiorari petitioner contends that there were some other legal points or questions in the case. Some of these we have been unable to locate in the state court record of the trial. But whether the other points were presented in the trial court in legal objections or not, they were all out of the case when the appeal was presented to the Court of Appeals of Georgia for decision on one point only, the appellants declaring:

> "The appellants in this case are content to base their case in this Court on the one main proposition contended all throughout the trial of the case in the Criminal Court and in the Superior Court on certiorari, to-wit: THAT IT WAS ISSUED FOR ARTICLES NOT PROVIDED FOR BY STATE STATUTE."

On this question the Court of Appeals of Georgia held that Georgia had adopted "the common law of England, and such of the statute laws as were usually in force before the Revolution . . . " And they held that under the common law search warrants could lawfully issue for such things as stolen or forfeited property, burglar's tools and weapons, implements of gambling, and many other things of like character, citing in support of that finding a United States Supreme Court decision, *Gouled* v. *United States,* 255 U.S. 298, 308, 41 S. Ct. 261. The fact that the Georgia appellate court cited the United States Supreme Court decision on the question did not convert it into a Federal question. It was still a state question —

whether the Georgia law authorized search warrants to issue for such articles as the present search warrant issued for.

Annotated under Rule 19, Supreme Court Rules, in TITLE 28, Supp., we note the case of *Ellis* v. *Dixon,* 349 U.S. 458, 75 S. Ct. 850, annotated under the key subhead: "8.—Questions not raised below." In that case the United States Supreme Court dismissed the certiorari "on the ground that we lack jurisdiction" (Page 464), the basis for the ruling being that the constitutional question which petitioners sought to carry up by their certiorari did not appear to have been ruled upon by the state appellate court. The *Dixon* decision also points out: "This Court has often refused to decide constitutional questions on an inadequate record." (Page 464)

In *Phyle* v. *Duffy,* 334 U.S. 431, 68 S. Ct. 1131 (1948), the Supreme Court held that certiorari does not lie to determine whether state procedure deprives one of due process if petitioner has not invoked proper state remedy to have such matter determined. The closing language of the opinion said:

> "In this situation we find no federal constitutional question presented which is ripe for decision here. So here, as in *Woods* v. *Nierstheimer,* supra (328 U.S. 211) being unable to say that the judgment denying habeas corpus may not rest on an adequate non-federal ground, the writ of certiorari is Dismissed."

So in the present case, if the defendant Ellenburg had any basis in the trial court record for contending that his constitutional rights were violated by admitting in evidence the search warrant, he *abandoned that contention*

in the Court of Appeals of Georgia, invoking that court's decision on the non-federal ground that the search warrant issued for articles not provided by state statute, which question the Georgia appellate courts have now decided adverse to him. In this situation "there is no federal constitutional question presented which is ripe for decision here."

In *Northwestern Bell Tel. Co.* v. *Nebraska State Ry. Com.*, 297 U.S. 471 (1), 56 S. Ct. 536 (1936), a ruling on this subject was summarized as follows in the first headnote:

> "The record failing to disclose what, if any, federal questions were presented to the state supreme court, review here is accordingly confined to those which are discussed in the opinion of that court."

In *Wilson* v. *Cook*, 327 U.S. 474, 66 S. Ct. 663, an appeal from and writ of certiorari to the Supreme Court of Arkansas, involving an alleged invalidity of a certain tax, the Court said: (P. 483)

> "But we are not free to consider these grounds of attack for the reason that they were not presented to the Supreme Court of Arkansas or considered or decided by it."

And the *Wilson* v. *Cook* decision, P. 484, also said, quoting from *Peo. of State of N. Y.* v. *Graves*, 300 U.S. 308, 317, 57 S. Ct. 466:

> "In reviewing the judgment of a State court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the consti-

tution with respect to which other questions are properly presented."

2. Applicant's Other Questions, Which Were Not Ruled Upon In State Court, Present No Substantial Federal Question.

In addition to the question presented to the Georgia Court of Appeals and there decided, the applicant for certiorari now asks the United States Supreme Court to take up several other questions which were not decided by the Georgia appellate courts.

While it would seem that these "other questions" are not properly up for consideration now, we wish to point out, however, that no substantial federal question is involved in them, and they do not present any sufficient reason for reversing the judgment.

The petition contends that this Court should decide whether the search warrant in this case gave sufficient description of the things to be searched for. The affidavit in the instant case, on which the search warrant was issued, describes the property to be searched for as "records of bets, names or symbols of bettors, amounts bet, amounts of money 'laid off' with other professional bookmakers, financial records showing the status of said bookmaking business and showing the amount of money owed to winning bettors and the amount of money to be collected from losing bettors, large quantities of 'flash paper' being inflammable paper which can be instantly ignited so as to destroy any records of the commission of said offense, and large sums of money representing wagers collected from bettors on said professional and college football games." The search warrant itself incorporates this description by reference in the following

words: "records, money and other bookmaking paraphernalia described in the attached affidavit."

Respondent invites this Court to compare the foregoing description of the property to be searched for with the following descriptions of similar property in Federal affidavits and search warrants, which have been held to sufficiently describe the gambling paraphernalia:

United States v. *Clancy,* (CA 7, 1960), 276 F. 2d. 617; rev. on other grounds, 365 U. S. 312: ". . . divers records, to-wit books, memoranda, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business on said premises, such files, desks, tables and receptacles for the storing of the books, memoranda, tickets, pads, tablets and papers aforesaid, and divers receptacles in the nature of envelopes in which there is kept money won by patrons . . . and divers other tools, instruments, apparatus, United States currency and records . . ."

Merritt v. *United States,* (CA 6, 1957), 249 F. 2d. 19: "Lottery tickets and other paraphernalia which will indicate a numbers operation is being conducted on the premises."

Clay v. *United States,* (CA 5, 1957), 246 F. 2d. 298, cert. den. 355 U.S. 863: "Books, records, papers, documents and memorandum relating to the business of accepting wagers by a person or persons."

Nuckols v. *United States,* (D. C. Cir. 1938), 99 Fed. 2d. 353, cert. den. (Sub Nom): *Floratos* v. *United States,* 305 U.S. 626: "Gaming tables, gambling devices, racehorse slips and gambling paraphernalia used in violation of Sec. 865."

Even a cursory reading of the description of the property to be searched for and seized as set out in the State Court affidavit and search warrant shows clearly that the description is more detailed and specific in the present case than those in any of these four Federal cases. In the *Nuckols* case, supra, the Circuit Court of Appeals for the District of Columbia stated, "In the search of a gambling establishment the same descriptive particularity is not necessary as in the case of stolen goods."

It is, therefore, quite clear that the affidavit and search warrant in this case were not "general" as contended by Petitioners, but the descriptions were quite specific.

NO SUBSTANTIAL FEDERAL QUESTION IN ADMITTING LINE SHEET

In his application for certiorari, petitioner seeks to raise such trial questions as admissibility of a "line sheet" seized among the other papers and records of the gambling house operators. No federal question is involved, for the reasons aforementioned, and also for the reason, that this would be included among the "instrumentalities" by which the illegal business was carried on. While it was reasonably included in the description of the gambling paraphernalia furnished the magistrate by the affidavit for the search warrant (see above), the universal rule is that officers executing a valid search may seize objects not named in the search warrant, even when they are the subject matter of an entirely different crime. *Johnson* v. *United States,* (CA DC, 1961) 293 F. 2d. 539. *Palmer* v. *United States,* (1953), 203 F. 2d. 66. *Harris* v. *United States,* 331 U.S. 145, 67 S. Ct. 1098. In the *Palmer* case, supra, it was stated, "But it is well established that given a lawful search some things may be seized in connection therewith which are not described

in the warrant." In the present case the "line sheet" was seized in connection with the same offense and was the same type of instrumentality of the crime as were those specifically described in the affidavit and search warrant. There was certainly no error in allowing the line sheet in evidence, and no federal question is involved.

STANFORD v. TEXAS distinguished

Petitioner, in his application for certiorari, cites and relies on *Stanford* v. *Texas,* 379 U.S. 476, 85 S. Ct. 506. In fact, it seems to be the only case which he cites in support of his petition. That case is distinguished from the present case in at least two very definite ways: *First,* it was a certiorari from the highest state court in Texas to which applicant could appeal on the question involved (page 480), and the applicant had asserted in that court several federal constitutional claims which had been denied, furnishing a proper basis for an appeal to the Federal court, in contrast with the case now at bar. *Second,* the things ordered to be seized by the search warrant were books and other written instruments of the state Communist Party, and it was pointed out that these books and papers were ordered seized because of the "ideas" they contained, thus clashing with the principle of freedom of speech and freedom of the press. No such principle is involved in the present case, in which the "books" were not ordered seized for any "ideas" contained therein, but were "books" in the sense of records and accounts and were ordered seized as instrumentalities of committing the offense of operating the gambling house. On page 485 the Stanford decision discussed the principle of freedom of speech and press there involved, and said:

> "In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are *books,* and the basis for their seizure is the *ideas* which they contain. (cit.) No less a standard could be faithful to the First Amendment freedoms."

A footnote to the above extract cited *Marron* v. *U. S.*, 275 U.S. 192, 198-199, 48 S. Ct. 75, 76-77, as pointing out that a "book" which is no more than a ledger of an unlawful enterprise might thus stand on a quite different constitutional footing from the books involved in the Stanford case.

In this connection see *Landau* v. *U. S. Attorney*, 82 F. 2d 285 (2), (2 CA, 1936) cert. den. 298 U.S. 665. *Foley* v. *U. S.*, 64 F. 2d 1 (7) (5 CA, 1933) cert. den. 289 U.S. 762. *Bennett* v. *U. S.*, 145 F. 2d 270, (4 CA, 1944). These additional cases illustrate the principle that "books" in the sense of records of an illegal enterprise come within the category of instrumentalities of crime and are therefore subject to seizure as such without violating the constitutional principles which seizure of books containing ideas would involve.

PROBABLE CAUSE SUFFICIENTLY SHOWN

An additional contention now made by petitioner is that the search warrant should be held void by the United States Supreme Court because it didn't use the words "probable cause." The warrant said: "For sufficient cause made known to me, you are commanded . . ." The facts stated in the affidavit accompanying the war-

rant are ample to authorize the finding of probable cause. There is no special magic in the words "probable cause." The words used in the warrant are sufficient to show that the magistrate determined that there was probable cause for issuing it. The facts and recitals measure up to all the requirements pointed out in *Ker* v. *California,* 374 U.S. 23, 34-35; 83 S. Ct. 1623, 1630. That case set forth and discussed the facts relied upon to establish "probable cause" and then instead of saying that "probable cause" had been shown the Opinion stated that the facts pointed out "clearly furnished grounds for a *reasonable belief* that petitioner George Ker had committed and was committing the offense . . ." In *34 Words & Phrases* (perm. ed.) pages 22 to 32, several dozen cases are pointed out from state and Federal courts referring to the meaning of the words "probable cause" in the issuance of search warrants, most of them saying that "reasonable grounds for belief" are equivalent words. One of the cases is *Dandrea* v. *United States,* 7 F. 2d 861, 864, which gives the following as a quotation from *Stacey* v. *Emery,* 97 U.S. 642:

> "Probable cause has been defined by this court as 'reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.'"

CONCLUSION

For the foregoing reasons, Respondent urges this Court to decline to issue the writ of certiorari.

Respectfully submitted,

LEWIS R. SLATON,
Solicitor General
Atlanta Judicial Circuit

J. WALTER LECRAW,
Assistant Solicitor General
Atlanta Judicial Circuit

J. ROBERT SPARKS,
Assistant Solicitor General
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Fulton County Courthouse
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I, J. Walter LeCraw, of counsel for the State of Georgia, Respondent in the foregoing case, certify that I have this day served the foregoing brief of Respondent upon opposing counsel by mailing a copy of same to Hon. Wesley R. Asinof, counsel for the petitioner, at his office, 419 Atlanta National Building, Atlanta, Ga. 30303.

This November 10, 1966.

J. WALTER LECRAW,
Assistant Solicitor General
Atlanta Judicial Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Number 670

JOHN LESTER ELLENBURG AND
BEN EDELSTEIN,

Petitioners

vs.

THE STATE OF GEORGIA,

Respondent

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONERS IN CERTIORARI

WESLEY R. ASHCRAFT
Attorney for Petitioners
419 Atlanta National Building
Atlanta, Georgia 30303

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Now comes JOHN LESTER ELLENBURG and BEN EDELSTEIN, Petitioners in Certiorari, and files this supplemental brief, and shows:

AUTHORITY FOR FILING SUPPLEMENTAL BRIEF

This supplemental brief is filed in accordance with Rule 24 (4) of the Supreme Court Rules authorizing the filing of a reply or supplemental brief.

REASON FOR FILING SUPPLEMENTAL BRIEF

The original certified record of the Georgia Court of Appeals showed that the Court of Appeals of Georgia entered no opinion upon denial of the motion for rehearing. The petition for certiorari was presented in that light.

Now, upon request of counsel for the State of Georgia, the Clerk of the Court of Appeals of Georgia has forwarded to this Court a supplementary certificate dated October 26, 1966, together with an additional opinion of the Court of Appeals on motion for rehearing to that Court.

The Clerk of the Court of Appeals now certifies that the material was inadvertently overlooked when the certified copy of the record in this case was prepared. He further certifies that the two paragraphs of the record certified to by him "were *published* by the Court on May 4, 1966, at the time the motion for rehearing was denied."

Petitioner's supplemental brief will be addressed to this specific question.

ARGUMENT ON SUPPLEMENTED RECORD

The Clerk of the Court of Appeals of Georgia now certifies that the opinion of the Court of Appeals on rehearing was *published* by the Court. However, the heading of the opinion is as follows:

"ON MOTION FOR REHEARING

(Not to be published)"

Counsel for Petitioners must confess that they are at a

loss as to the proper interpretation of such an order. When we first received it from the Court of Appeals with the notation thereon "not to be published" we took it to be a mere memoranda from Court to counsel. When the Clerk of the Court of Appeals certified the entire record from that court, he apparently interpreted it the same way, since it was not included in the record certified to by him. Now counsel for the State of Georgia seeks to have it made a part of the record so that an order for it to be not published now appears to have been published.

However, whether published, unpublished, private memoranda or public record, the additional opinion can lend nothing to the constitutional questions involved in the case at bar except to serve as a reminder that the courts of Georgia are still refusing to pass on constitutional issues whenever possible.

GIST OF ADDITIONAL OPINION

The Court of Appeals, in denying rehearing, stated that appellants were seeking to raise questions in addition to that which they argued on the appeal and which the Court answered in the opinion. The Court of Appeals then quoted from appellants' original brief, wherein the statement was made that

> "The appellants in this case are content to base their case in this Court on the one main proposition contended all throughout the trial of the case in the Criminal Court and in the Superior Court on certiorari, to-wit: THAT IT WAS ISSUED FOR ARTICLES NOT PROVIDED FOR BY STATE STATUTE."

Because of the foregoing excerpt taken from one of the briefs filed by counsel for petitioners in the Court of Appeals the State of Georgia will now seek to wash away any attempt to safeguard the constitutional protection to which a defendant in a criminal case is entitled. Such an excerpt, taking the form of a solemn judgment of the highest court of the State entitled to pass on the question, is being used by the State of Georgia to frustrate the petitioners in their attempt to have this important constitutional question decided on its merits and to thwart this Court from deciding such issue.

It is true enough that counsel for petitioners were content to *"base"* their case on one *"main proposition"* in the Court of Appeals. Nowhere, however, does it appear that the constitutional questions here urged were ever *"abandoned"* or *"waived"* by counsel. The record filed in this Court shows that the constitutional issues were presented to the trial court and were expounded at length at that time. They were preserved in the Superior Court by specifically urging them in the petition for certiorari to that court. They were also preserved in the enumeration of errors to the Court of Appeals by a general assignment of error.

The Georgia Court of Appeals has here attempted to assert a non-federal procedural ground as a basis for failing to decide a federal question. The question is, therefore, whether the state ground for the Georgia court's refusal to consider the constitutional question is *adequate*. See: *Wright* v. *State of Georgia*, 373 U.S. 284 (83 S. Ct. 1240), holding as follows:

> "Thus the holding of the Georgia court must not have been that the petitioners *abandoned* their argu-

ment but rather that the argument could not be considered because it was not explicitly identified in the brief with the motions for new trial." (italics added)

In deciding the State ground to be inadequate in that case, this Court then went on to hold:

"Its inadequacy is especially apparent because no prior Georgia case which respondent has cited nor which we have found gives notice of the existence of any requirement that an argument in a brief be specifically identified with a motion made in the trial court."

In the case of *Staub* v. *Baxley,* 355 U.S. at 320 (78 S. Ct. at 281), from the Georgia Court of Appeals, it was held:

"To require her (petitioner), in these circumstances, to count off, one by one, the several sections of the ordinance would be to force resort to an arid ritual of meaningless form."

In *Davis* v. *Wechsler,* 263 U.S. 22 (44 S. Ct. 13), it was held:

"Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

In *Ward* v. *Board of Commissioners of Love County,* 253 U.S. 17 (40 S. Ct. 419), the effect of such non-federal basis for denying federal rights was decided as follows:

> "It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support * * * (for) if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided."

In the more recent case of *N.A.A.C.P.* v. *Alabama*, 377 U.S. 292 (84 S. Ct. 1302) (1964), it was held:

> "The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense."

Under Georgia procedure, briefs of the parties in the appellate court are not a part of the record. The question for decision by the appellate court is made by the enumeration of errors. In this case, the enumeration of errors was sufficient to raise every question decided by the Superior Court of Fulton County in overruling the petition for certiorari.

In conclusion, petitioners desire to point out to this Court that the serious constitutional questions should be passed upon. From the inception of this case in the trial court, where the trial judge fully expressed his dissatisfaction with the decisions of this Court on constitutional issues, to the Court of Appeals of Georgia, petitioners have been beset with all forms of procedural obstacles to prevent the questions from being properly answered.

Certiorari should be granted, and the validity of the search warrant explored.

Respectfully submitted,

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